



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Pittman Mechanical Contractors, Inc.

**File:** B-225486

**Date:** February 25, 1987

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### **DIGEST**

1. An amendment which advised bidders of certain obvious conditions affecting the removal and replacement of boilers is not material where the IFB as issued required bidders to perform the work necessary to remove existing boilers and install replacement boilers and expressly warned bidders to inspect the work site to ascertain the difficulty and cost of the work.
2. Low bidder's failure to acknowledge an amendment which had a negligible affect on the quality of performance and price was properly waived.
3. Protest basis first raised in protester's post conference comments which could have been raised in its initial protest filed over a month earlier is dismissed as untimely.

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### **DECISION**

Pittman Mechanical Contractors, Inc., protests the award of a contract to Pipe, Inc., under invitation for bids (IFB) No. N62470-85-B5376 issued by the Navy. The IFB called for the removal of two existing boilers (boilers No. 4 and 5) and installation of two new boilers and renovation of the boiler building.

We deny the protest in part and dismiss it in part.

Pipe submitted the low bid in the amount of \$1,067,000 and Pittman's bid was second low at \$1,137,000. Pittman argues that the Navy improperly accepted Pipe's low bid because Pipe failed to acknowledge amendment No. 4 to the solicitation which Pittman argues made several material changes affecting the cost of the project.

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The amendment added a "demolition note" to a floor plan drawing contained in the solicitation to "remove an existing steel window and door assembly directly in front of boiler No. 4" to allow for the removal of that boiler and to reinstall the window/door assembly after installing the new boiler. The amendment noted that the window/door assembly in front of boiler No. 4 appears in a photograph contained in the solicitation.

The amendment also added a note to a site plan drawing to remove two guywires supporting a utility pole "as required to allow for removal of old boiler No. 5 and installation of new boiler No. 5" and "provide temporary support of the pole as required." The amendment further stated that high build glaze coating is called for where the term "epoxy paint" is indicated. Finally, the amendment added the following under the "Products" section of the solicitation: "Pumps: In the first line, immediately following 'MIL-P-17552,' insert the following: 'Type II-boiler feed type, Style 1-horizontal split case style.'"

Pittman argues that the cost to remove and reinstall the window/door assembly in front of boiler No. 4 as required by the demolition note in amendment No. 4 adds over \$20,000 to the cost of this project. In this regard, the firm points out that the floor plan drawing contained in the original solicitation shows an opening wide enough to remove the boiler without removing the window/door assembly. Further, while the original solicitation contains photographs of the boiler building, "it is impossible to tell from those photographs whether there is a single large door or some other sort of door assembly that would allow boiler No. 4 to be removed easily or whether the entire assembly would have to be demolished and removed by someone."

With respect to removing the guywires to gain access to boiler No. 5, resulting in the need for temporary support to the utility pole, the protester points out that prior to the addition of this note in amendment No. 4, the solicitation merely required the shortening of one of the guywires to allow vehicular access to a storage room garage door. The firm thus argues that amendment No. 4 added a new requirement to remove both guywires supporting the utility pole and provide temporary support for that pole which according to the protester costs over \$6,000.

Finally, the protester states that the high build glaze coating required by amendment No. 4 costs over \$960 more than

the epoxy paint originally specified in the solicitation. The protester concludes that the cost of the changes added by amendment No. 4 could increase the contract price by over \$28,300, more than 40 percent the \$72,000 difference between the two low bids.

The agency responds that the demolition and site plan drawing notes added by amendment No. 4 did not alter or change the basic contract requirement stated in the solicitation that the successful contractor "provide and secure demolition and removal of two existing boilers and [install] 2 new boiler systems complete and ready for use." The agency states that the demolition and site plan drawing notes added by amendment No. 4 merely provided bidders with information affecting the condition of the worksite. For example, to remove boiler No. 4 from the boiler building, the window and door assembly directly in front of the boiler would have to be removed and in order to gain access to and remove boiler No. 5, certain obstructing guywires would have to be temporarily removed. The agency maintains that with or without this information, under the terms of the original solicitation the contractor is responsible for removing the old boilers and installing the new boilers and assessing the difficulty of the task.

As to the protester's final argument, the Navy asserts that the amendment language was merely a clarification of a previously stated contract requirement since the original IFB provision at issue already was entitled "High Build Glaze Coatings" and the amendment explained the Navy's intent that wherever the term epoxy paint was used, it meant high build glaze coating.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 C.P.D. ¶ 457; Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 C.P.D. ¶ 284. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery or the relative standing of the bidders. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1986); Wirco, Inc., B-220327, Jan. 29, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 C.P.D. ¶ 103. An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation, that is, for example, it merely clarifies an existing

requirement. Maintenance Pace Setters, Inc., B-213595, supra. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted. Emmett R. Woody, B-213201, Jan. 26, 1984, 84-1 C.P.D. ¶ 123.

We do not find that the drawing notes added by amendment No. 4 imposed any legal obligation different from that imposed under the original solicitation. We agree with the Navy that the original solicitation legally obligated the contractor to remove the old boilers and install the new boilers. The contractor was responsible for removing any obstructions to removal and replacement of the boilers. In this regard, the IFB, in at least two places, warned bidders to inspect the site and take "other steps as may be reasonably necessary to ascertain the nature and location of the work in general and local conditions which could affect the cost" of the work. The IFB further warned bidders that the failure to do so "would not relieve bidders from responsibility for estimating properly the difficulty and cost of successfully performing" the work. The IFB also provided photographs depicting the boiler building and site plans drawings to provide the fullest information possible as to the work involved and potential performance difficulties to be considered by bidders.

Here, the protester does not argue that the boiler removal work could be accomplished without removal of the window/door assembly and guywires. Further, the record indicates and the protester does not refute that these conditions affecting the removal and installation of the boilers were reasonably ascertainable from a site inspection and, thus, already were known or should have been known to bidders regardless of the amendment. The unrevised IFB clearly advised bidders to make a site inspection and warned of the consequences of not examining the site. Thus, bidders were on notice of obvious conditions such as guywires, poles and windows which affected the removal and replacement of boilers and, regardless of the amendment, should have assessed the cost of temporarily removing these obstructions to perform the boiler replacements. Therefore, we do not find the drawing notes added to amendment No. 4 material. See Maintenance Pace Setters, Inc., B-213595, supra.

As explained above, an amendment is material if it affects the cost of or quality of performance in more than a negligible way. See e.g., Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 C.P.D. ¶ 374; Doyon Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 C.P.D. ¶ 194.

Concerning the high build glaze coatings requirement, even assuming that the protester is correct that the amendment constitutes a change in the painting requirement and its estimate of \$960 as the cost of the change is correct, this estimated increase is de minus as to both the given total cost of the work and the difference between Pittman's and Pipe's bids. See Power Service, Inc., B-218248, supra.

The protester also argues that there is a qualitative difference in these type of finishes. The record is not clear on this point; however, we find the high building glaze coating requirement to be negligible in the context of this contract. The high build glaze coating essentially is a finishing coat for the bathroom/locker rooms in the boiler building and we cannot conclude that the type of finish on these facilities materially affects the quality of work under this contract which primarily concerns removal and replacement of boilers. See Power Services, Inc., B-218248, supra.

Finally, in its conference comments, Pittman raises for the first time, an allegation that the amendment requirement for a "type II-Style I" boiler feed pump is a material requirement which cannot be waived. The protester argues that this protest allegation is not new and was encompassed by its original general protest against the agency's waiver of the amendment. We find this ground for protest untimely.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986), a protest must be filed within 10 working days of the date the protester was aware or should have been aware of the basis for its protest. Pittman's original protest filed on November 13, 1986, specified the three previous grounds of protest concerning the amendment's alleged materiality which are addressed in this decision. While the protester argues that we should now consider its arguments in its January 7, 1987, protest conference comments that the amendment requirement for a "type II-Style I" boiler feed pump is material, our regulations do not contemplate the piecemeal development of protest issues. Contel Information Systems, Inc., B-220215, Jan. 15, 1986, 86-1 C.P.D. ¶ 44. Since this issue was not raised in Pittman's November 13 protest, but clearly could have been, it is untimely and not for our consideration. Arndt & Arndt, B-223473, Sept. 16, 1986, 86-2 C.P.D. ¶ 307; Contel Information Systems, Inc., B-220215, supra.

The protest is denied in part and dismissed in part.

*for* *Raymond E. Van Cleve*  
Harry R. Van Cleve  
General Counsel